

No. 22049 A

3458

3458

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

K-S-H PLASTICS, INC., a Missouri corporation,
Appellant,
vs.

SUNBEAM LIGHTING COMPANY, INC.,
a California corporation,
Appellee.

APPELLANT'S OPENING BRIEF

FILED

NOV 13 1967

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NOV 15 1967

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APPELLANT'S OPENING BRIEF

**STATEMENT OF PLEADINGS AND
JURISDICTIONAL FACTS**

A. Statement of the Pleadings

1. The Complaint and Answer

Plaintiff, K-S-H Plastics, Inc., subsequent to deposing several employees and officers of Sunbeam Lighting Co. Inc., (hereinafter referred to as "Sunbeam") in connection with plaintiff's suit against Carolite (Appeal No.

22049), filed its complaint against Sunbeam. (Vol. I, R. 2).*

The complaint charged Sunbeam with unfair competition and predicated jurisdiction upon diversity of citizenship and an amount in controversy over Ten Thousand Dollars (\$10,000.00) exclusive of interest and costs.

The complaint alleged that Sunbeam was palming off lighting panels, identical to those made and sold by plaintiff, upon purchasers who requested, demanded or specified plaintiff's lighting panels, without obtaining any approval for such substitution.

On April 12, 1966, Sunbeam answered, (Vol. I, R. 6) denying that it was guilty of palming off and affirmatively alleging that the court lacked jurisdiction, that plaintiff was guilty of unclean hands because of violation of the anti-trust laws, and other defenses.

2. Subsequent Pleadings

Plaintiff moved on February 25, 1966 for a preliminary injunction to prevent Sunbeam's unfair competition. After Sunbeam's reply, the Court denied plaintiff's motion on April 12, 1966. (Vol. I, R. 11) Simultaneously the Court ordered the case consolidated for trial with plaintiff's action against Carolite and set both causes for trial. (Vol. I, R. 11) Prior to this order, Sunbeam had written a letter to the trial court advising that its case was related to the Carolite case.

* The Record comprises ten volumes, volumes three through ten containing the testimony at the trial. References to volume one are identified as "Vol. I, R. —." Volume II is the record in the Carolite Case. The remaining volumes with consecutive pagination are identified only by page reference numeral, thus "R. —."

On May 20, 1966, Sunbeam moved to dismiss under Rule 12(b) (1) on the ground that the Court lacked jurisdiction over the subject matter or alternatively to compel plaintiff's further answers to interrogatories previously served by Sunbeam. By order of June 7, 1967, this motion was continued to and until trial of the action. (Vol. I, R. 13)

Several other motions regarding discovery were also adjudicated by the court on June 7, 1966, by ordering that all discovery be terminated. (Vol. I, R. 13) Plaintiff thereafter applied to this Court for leave to file a petition for a Writ of Prohibition which was denied with direction to the District Court to allow plaintiff to show that the lower court abused its discretion by terminating discovery. At the trial of this action, the lower court offered plaintiff the opportunity to take further discovery after plaintiff's *prima facie* case was presented, stating that without such opportunity it would probably be an abuse of discretion to conclude the case. (R. 655) Further discovery was rendered unnecessary, however, by reason of admissions made by Sunbeam (R. 659-60) and statements made by the court relating to costs and relief (R. 663, 668) discussed more fully hereafter.

After the trial, the Court rendered its decision and subsequently entered Findings of Fact and Conclusions of Law prepared by Sunbeam (Vol. I, R. 15-22) after refusing to enter Findings of Fact and Conclusions of Law submitted by Plaintiff.

B. Jurisdiction of the District Court and of the Court of Appeals for the Ninth Circuit.

1. Jurisdiction of the District Court

Jurisdiction is based upon Section 1332 of Title 28 of the United States Code. The lower court found that plaintiff was a citizen of Missouri having its principal place of business therein and that Sunbeam was a citizen of California having its principal place of business in that state. (Vol. I, R. 16) The court further held that it had jurisdiction over the parties and the subject matter of the action. (Vol. I, R. 21)

2. Jurisdiction of the Court of Appeals

Judgment was entered for plaintiff in part and in part for Sunbeam on May 4, 1967. (Vol. I, R. 23) Jurisdiction on appeal is based upon Section 1291 of Title 28 of the United States Code and upon plaintiff's notice of appeal filed on May 31, 1967. (Vol. I, R. 40)

STATEMENT OF THE CASE

A. Summary of the Facts

1. Plaintiff's Business and Products

A complete description of plaintiff's business and the products it manufactures and sells is included in plaintiff's brief in co-pending Appeal No. 22049, at pages (4) through (7).

Insofar as this case is concerned, it is only important to note that plaintiff makes and sells lighting panels purchased directly by fixture manufacturers, such as Sunbeam, and sold by them with the fixture to the ultimate consumer. An explanation of the distribution system for lighting panels and lighting fixtures will facilitate understanding of the manner in which Sunbeam effected the palming off.

2. Sunbeam's Business and an Explanation of The Specification System

Sunbeam Lighting Co., Inc. is a manufacturer of lighting fixtures. The fluorescent lighting fixtures made and sold by Sunbeam include lighting panels which are either purchased from sources such as plaintiff or Carolite or are manufactured for Sunbeam and sold as a Sunbeam product. For example, Sunbeam sells panels under its trademarks Metalux and Sunlux. (R. 689) Where the lighting panels requested by the customer are other than those sold as Sunbeam panels, such panels are purchased from a panel manufacturer and incorporated into the fixture prior to delivery to the customer.

Lighting fixtures and lighting panels are distributed by a specification and bid system in which the specification is prepared by an architect or lighting engineer as agent for the building owner. (Finding of Fact No. 5, Vol. I, R. 17) The specification designates the lighting fixture and panel by the use of the manufacturer's name, trade symbol or catalog number. In some specifications, the lighting panel is identified as part of the lighting fixture designation, and in others, by a separate designation such as "K-5 acrylic panels" or "K-S-H K-12 polystyrene panels." The lighting fixture manufacturers prepare bids which are based upon the specification; however, the bid may be based upon substitute products in which event the specifier has the right to approve the substitution. The system assures control by the lighting engineer over the type and manufacturer of each product installed in the building and maintains such control by the requirement of formal approval or authorization for any substitute.

The electrical components are purchased by purchase orders emanating from the general or electrical con-

tractor to an electrical distributor which in turn issues a purchase order for the lighting fixtures and panels to the lighting fixture manufacturer which bid successfully.

**3. Testimony Regarding the Function Performed
By the Symbols K-4, K-5, K-11 and K-12**

**(a) Representatives of Lighting Panel
Manufacturers**

A representative from only lighting panel manufacturer (other than plaintiff and Carolite), Sheffield Plastics, Inc., testified with respect to the usage of the trade symbols K-4, K-5, K-11 and K-12 in the industry. Mr. Frank Teague, vice-president in charge of sales, testified that Sheffield Plastics, Inc. was a vigorous competitor of plaintiff and was familiar with plaintiff and the manner in which its products were identified. (R. 234-35, 265) With specific reference to the use of the trade symbols K-4, K-5, K-11 and K-12, Mr. Teague testified as follows:

“Q. What does K-4, K-5, K-11 and K-12 mean to you?

A. A lens manufactured by K-S-H.

Q. And any particular lens?

A. Each K number denotes a particular lens.”
(R. 235)

Like many other lighting panel manufacturers which use alphanumeric trade symbols to identify their lighting panels, Sheffield Plastics, Inc. uses the terms SL-23, SL-35, SL-56 and SL-87. (R. 241; Plf. Exs. 40 and 41) The panel identified with trade symbol SL-56 has the identical pattern configuration to plaintiff's K-4 panel. (R. 244-45; Plf. Exs. 40 and 41) And the panel designated SL-87 has a pattern configuration identical to plaintiff's K-5 panel. (R. 244-45; Plf. Exs. 40 and 41)

Under extensive cross-examination Mr. Teague demonstrated that he was familiar with the trade symbols used by numerous lighting panel manufacturers but was not aware of any manufacturer using the symbols K-4, K-5, K-11 and K-12 other than plaintiff. (R. 62-65)

(b) Representatives of Lighting Fixture Manufacturers

Testimony was elicited from a number of representatives of lighting fixture manufacturers other than Sunbeam. The deposition of Mr. Harold Glass, executive vice president of Lighting Products, Inc., was introduced in evidence on behalf of plaintiff. (Plf. Ex. 106) Mr. Glass testified that over ninety per cent of the sales of Lighting Products, Inc. were in response to specifications and that it was customary for lighting engineers to specify plaintiff's panels with the designation, for example, K-12. (Plf. Ex. 106, Glass Depn. pp. 12 and 25) With respect to the source identifying function of several of plaintiff's trade symbols, Mr. Glass testified as follows:

"Q. Now, what does K-11 and K-12 mean to you when you see it anywhere?

A. It means that this is a particular prismatic panel that has been designated by a specifier, and to indicate a panel made specifically by the K-S-H Plastics Company.

* * *

Q. If it designates, the specification designates, as it does on Plaintiff's Exhibit 217A, for a K-12 Acrylic Lens ---

A. To my mind he definitely wants a K-12 panel which is manufactured by K-S-H, and nothing else." (Plf. Ex. 106, Glass Depn., pp. 7 and 13-14)

Under cross examination Mr. Glass testified with respect to the trade symbol K-12 as follows:

“Q. Does the ‘K-12’ reference in your quotation refer to the physical configuration of a panel that you would supply?

A. It refers both to that and to the manufacturer.”
(Plf. Ex. 106, Glass Depn. p. 43)

The deposition of another vice president of Lighting Products, Inc., Eric Church, was also introduced in evidence. ((Plf. Ex. 107) Mr. Church testified that the symbols, such as K-5, K-11 and K-12, indicate lighting panels manufactured only by plaintiff. (Plf. Ex. 107, Church Depn., pp. 6-7) He also indicated that the term K-11 appearing with reference to plaintiff in the price list of Lighting Products, Inc. designated “a K-S-H panel.” (Plf. Ex. 107, Church Depn., p. 50)

Mr. Charles Perry, manager of the Sunnyvale, California plant of Day-Brite Lighting Company, one of the largest lighting fixture manufacturers in the country, testified at the trial of this action. Mr. Perry stated that Day-Brite offers a proprietary line of lighting panels for sale with its fixtures, *i.e.* lighting panels manufactured for Day-Brite and sold under its own name. It also offers plaintiff’s lighting panels as alternates to its own panels. (R. 528-29) With respect to his understanding as to the meaning of plaintiff’s trade symbols, the witness testified:

“Q. What does this letter and number mean to you?

A. The letter means that it is a lens supplied by K-S-H. The number designates one of the several configurations of lens that is offered by K-S-H.” (R.529)

In its catalogs and price lists, Day-Brite uses the symbols K-4, K-5 and K-12 without reference to the names K-S-H or K-LITE. (Plf. Ex. 31; R. 529, 537) On cross examination the witness was interrogated as to whether it sold lighting panels of other manufacturers having a pattern identical

to that on plaintiff's K-4, K-5 and K-12 panels, since it made no reference in its catalogs to K-S-H. The witness responded:

“Q. Other in relation to the K numbers?

A. No. If they are not a K-S-H product, we don't use a K reference on the lens that we offer in substitution for a K-S-H product.” (R. 534-35)

Two witnesses from Globe Illumination Company testified on behalf of defendants with respect to the usage of the terms K-4, K-5, K-11 and K-12. Mr. Robert Forgnone, purchasing agent, testified that these trade symbols designate patterns in part (R. 904) and upon further inquiry testified:

“Q. I am asking what your understanding is. Doesn't the K number also designate K-S-H?

A. Yes, I would say it does.” (R. 909-10)

The president, Mr. Leonard Rosenblatt, testified that “there are certain K designations which only go to K-S-H and there are others that could go either way.” (R. 962) This witness testified that plaintiff is the only panel manufacturer using the symbols K-4, K-5, K-11 and K-12. (R. 956)

Mr. Marx, vice president of Nu-Lite Fluorescent Mfg. Co., also testified for defendants that plaintiff's trade symbols designate only the pattern configuration embossed on lighting panels. He also stated that these trade symbols were used exclusively by plaintiff (R. 991) and admitted that prior to manufacture by Carolite, K-S-H Plastics, Inc. was the only manufacturer of panels having a pattern as appears on plaintiff's K-11 and K-12 lighting panels. (R. 993)

The sales manager of Acme Manufacturing Company, Mr. Eugene Wade, testified for defendants that each of

plaintiff's trade symbols identified a particular pattern and not a company but admitted that plaintiff was the exclusive user of these trade symbols. (R. 1035)

It was admitted by the representative of Globe, Nu-Lite and Acme (defendant's witnesses) that when they received specifications in which the lighting panel is designated with one of the symbols K-4, K-5, K-11 or K-13 alone they had continually supplied lighting panels of other manufacturers without obtaining approval of the specifying lighting engineer or architect. (Globe, R. 959; Nu-Lite, R. 987-88; Acme, R. 1021-22) These witnesses, called by Sunbeam, were aware that it was this conduct of substitution on specifications of this type without architect approval which plaintiff was charging was "palming off" by Sunbeam.

(c) Lighting Engineers

During the discovery taken by plaintiff relating to palming off by Sunbeam and Carolite, plaintiff had cause to depose a lighting engineer who was then employed as a general manager of an electrical contractor. The witness, Mr. Robert Kohnen, also testified with respect to the meaning of K-4 as follows:

"Q. And K-4 indicates what to you?

A. K-4 indicates a K-S-H acrylic lens to me." (Plf. Ex. 116, Kohnen Depn., p. 9)

Four lighting engineers testified at the trial, the first of which was Mr. J. S. Hamel. Mr. Hamel's experience throughout the nation in electrical and lighting consulting began nearly thirty years ago. (R. 500-01) The engineering consulting firm which he presently heads has completed the planning and design for the electrical lighting installations for the New York World's Fair on 1964 and 1965. (R. 501) Mr. Hamel, personally, has also been the consult-

ing engineer for Walt Disney Productions since 1963 and his firm has performed all of the consulting work on Disneyland and was engaged at the time of trial to do the consulting work on the Disneyland in Florida and on the Mineral King Resort area. (R. 501)

In the Los Angeles area, Mr. Hamel's firm has performed the electrical engineering and lighting consulting work on the Los Angeles International Airport, Chavez Ravine Ball Park, numerous buildings at the University of California and the University of Southern California and over 80 schools and industrial installations in the Southern California area. (R. 501-02) Mr. Hamel, who stated that he had long been familiar with K-S-H Plastics, Inc. testified as follows:

"The Witness: Well, the K, a number K-1 or K-5, as we have been using them in the trade, let us say, always meant K-S-H. I never heard of it used for anything else.

The Court: It always meant K-S-H?

The Witness: Yes. A similar situation prevails for glass. Corning Glass Company brought out a refracting glass pattern for the same purpose that the plastic is used for fluorescent lighting. They call it Pattern 70. When anyone says Pattern 70, we automatically think of Corning. Nobody else makes a Pattern 70." (R. 504)

Mr. Fred Cooper, also a lighting engineer in the private consulting field, testified that he was familiar with plaintiff's products and with the fact that they were designated with the trade symbols K-4, K-5, K-11 and K-12. (R. 547) In response to an inquiry of whether the witness associated these trade symbols with a particular company, Mr. Cooper testified:

“A. Yes, I think quite clearly in my mind the concept of the K and the numeral has meant to me the K-S-H Manufacturing Company.” (R. 549)

On cross-examination the witness was questioned as to whether he used any of these trade symbols in oral conversations, as opposed to written specifications, to indicate both pattern and manufacture. The replication was as follows:

“A. Yes. Constantly we designate the K and the numeral both as the interpretation of the pattern we seek and the manufacturing plant. (R. 550)

Two lighting engineers, Henry Simmons and Arthur Root, testified for defendants that the symbols K-4, K-5, K-11 and K-12 designated pattern (R. 812; R. 864) Mr. Simmons stated that he was not aware of any lighting panel manufacturer other than plaintiff that used these trade symbols to designate their product. (R. 825) Similarly, Mr. Root testified that plaintiff was the exclusive panel manufacturer using these trade symbols. (R. 883) Although Mr. Root testified that K-4 was used in the industry to designate only pattern, he also stated that if he desired a lens made by Carolite he would not specify Carolite K-4 but would use Carolite C-4. (R. 864)

Representatives of Carolite and Sunbeam

Prior to the institution by plaintiff of the consolidated lawsuit against Sunbeam, a number of officers and employees were deposed in connection with the Carolite suit. Each of these witnesses were called by plaintiff at trial and admitted having made the deposition statements, although they offered various qualifications and explanations for their prior admissions.

The quotation manager of Sunbeam, Mr. Ed Lathram testified that K-S-H was the exclusive user of the trade

symbols K-4, K-5, K-11 and K-12 to designate their lighting panels. The witness stated that these symbols identified the manufacturer of a particular pattern lighting panel (R. 678) and as to his understanding of the function of these terms, he testified at his deposition:

“‘Q. So when you say a K number does that indicate that K-S-H makes that particular lens?

A. That is true.’”

The president of Sunbeam, Mr. Herbert L. Kreiger, admitted at the trial that he had stated at his earlier deposition as follows:

“‘Q. When you see a K number or hear a K number, do you associate it with any particular company?

A. K number, yes. K number I know is K-S-H.’”
(R. 703)

Mr. Kreiger also testified at his deposition:

“‘Q. And if you see a K-4 or K-5, you would assume that was a K-S-H product, correct?

A. Right.’” (R. 705)

Mr. Johannes H. Shirley, assistant sales manager for Sunbeam Lighting Company, also testified with respect to his familiarity with plaintiff company and its alphanumeric symbols. Mr. Shirley had previously testified at his deposition as follows:

“‘Q. Do the numbers K-4, K-5 and K-12 indicate to you the K-S-H Plastics Company?

A. Well, when I see the K, yes.’” (R. 711)

The witness then explained that K-4 and K-5 meant only a pattern configuration notwithstanding his previous deposition statements. Further deposition testimony was then used to examine the witness which testimony reads:

“‘Q. Earlier in your testimony you stated that as to the alphanumeric designations, such as K-5, would

indicate that the product was from K-S-H. Now, is it your understanding that the letter K in the alphanumeric designation designates K-S-H?

A. Well, because being in the industry and having seen those numbers for so long, I would know that K would refer to K-S-H, certainly.' " (R. 712)

The purchasing agent for Sunbeam Lighting Company, Mr. William Harden, testified that he had held this position for fourteen years and was familiar with plaintiff and the product identification symbols used by plaintiff. (R. 736-737) Mr. Harden had previously been deposed and had testified as follows:

" 'Q. And K meant K-S-H to you?

A. Presumably yes.

Q. And you know of no one else that uses the K designation, do you?

A. No, I do not.' " (R. 741)

At the trial the witness also admitted that he had stated at his deposition as follows:

" 'Q. So there isn't any question that K would mean K-S-H when you saw it with K-4 or K-5?

A. That is right.' " (R. 742)

Only one of the employees, Mr. Sol Matloff, testified at his earlier deposition that he did not associate the symbols K-4, K-5, K-11 and K-12 with lighting panels manufactured by plaintiff.

The sales manager of J. W. Carroll & Sons and Carolite, Inc. also testified at the trial with respect to the function of plaintiff's alphanumeric symbols. Mr. Vaughn testified as follows:

" 'Q. When you see the K number, Mr. Vaughn, do you think of K-S-H? Does K-S-H come to mind?

A. Well as a K standing by itself, not necessarily but it depends upon who I am talking to. If I am

talking to a buyer regarding prismatic lens, it would, yes.

Q. It would, yes?

A. Yes, with certain exceptions.

Q. Well, what are the exceptions?

A. Well, if I was talking to a buyer who had never purchased K-S-H lenses, if he was Sheffield or some other manufacturer, he might not be familiar with the K numbers.' ” (R. 759)

The witness was obviously indicating that lighting panel purchasers would be familiar with plaintiff's trade symbols only if he had purchased lighting panels manufactured by plaintiff.

4. Palming Off by Sunbeam

The question of whether Sunbeam was guilty of unfair competition by palming off involved two types of specifications (i.e. requests for lighting panels): (1) some specifications designated plaintiff's lighting panels with one of plaintiff's trade symbols, K-S-H or K-LITE, in conjunction with one of the trade symbols K-4, K-5, K-11 or K-12; and (2) other specifications designated the lighting panels with one of the trade symbols K-4, K-5, K-11 or K-12 alone.

As to the first type of specification, the court found that the use of K-S-H or K-LITE was a specific demand for lighting panels manufactured only by plaintiff. (Vol.I, R. 21) Plaintiff proved that on at least one construction job involving this type of specification, referred to as the Lincoln Hospital Job, Sunbeam substituted lighting panels made by Carolite without obtaining approval, and therefore palmed off such panels on the customer. (Vol. I, R. 21) To obviate further discovery, it was agreed that other instances of such palming off need not be proved by plain-

tiff, since this one instance would support plaintiff's requested injunctive relief.

An appropriate judgment order, enjoining both Sunbeam and Carolite from palming off Carolite panels where the panel designations included the terms K-S-H or K-LITE, was entered. (Vol. I, R. 23)

As to the second type of specification, where the panel was designated by one of the symbols K-4, K-5, K-11 or K-12 alone, plaintiff had the burden of proving: (1) that the use of such a symbol was a demand for plaintiff's lighting panel; and (2) that defendant substituted other panels when customers requested panels by the use of these trade symbols. The facts relating to the first point were discussed above under the preceding heading.

With respect to the second point, plaintiff proved that in the construction of the Charter Oaks Presbyterian Church, the paonels were identified in the specification with the designation "K-5". (Plf. Ex. 49) Sunbeam witnesses admitted that Carolite panels were supplied by Sunbeam, without obtaining approval. (R. 681-82) Similarly, in the construction of the Ronson Hydraulic Units Corp. Mfg. Building, the lighting panels were designated with the trade symbol "K-5". (Plf. Ex. 51) Again, Sunbeam substituted Carolite panels without obtaining approval. (R. 687) Moreover, it was admitted at trial by several of Sunbeam's officers and employees that it was Sunbeam's practice to substitute without approval on *all* specifications using K-4, K-5, K-11 or K-12 alone. (R. 605; 691-92) Finally, counsel for Sunbeam admitted in open court that there were additional jobs involving such substitutions and agreed to stipulate to this fact. (R. 658-60)

B. Questions Involved

1. Whether the primary significance of the trade symbols K-4, K-5, K-11 and K-12 to purchasers and prospective purchasers of plastic prismatic lighting panels is only to describe the pattern configuration embossed on such panels or whether such symbols identify lighting panels manufactured by K-S-H Plastics, Inc.

2. Whether Sunbeam was guilty of unfair competition by palming off through substitution of lighting panels identical in appearance to those made and sold by plaintiff, without approval, when plaintiff's lighting panels were specified by the trade symbols K-4, K-5, K-11 and K-12 alone.

ERRORS RELIED UPON

1. The court erred in finding that plaintiff's only use of the trade symbols K-4, K-5, K-11 and K-12 in its advertising was to identify patterns, that plaintiff advised or instructed specifiers to use the term K-LITE and that plaintiff has not regarded the trade symbols K-4, K-5, K-11 and K-12 as indications of source and has relied only upon its registered trademarks to identify the maker of the goods. (Finding of Fact No. 9, Vol. I, R. 19)

2. The court erred in finding that K-4, K-5, K-11 and K-12 are regularly used by fixture manufacturers to sell lighting panels other than those made and sold by plaintiff, that these trade symbols are generally used to indicate pattern only, that these trade symbols are not associated by specifiers with a single source, and that the primary significance of these trade symbols is one of pattern and not source. (Finding of Fact No. 10, Vol. I, R. 19)

3. The court erred in finding that plaintiff did not establish a secondary meaning for the terms K-4, K-5, K-11 and K-12. (Finding of Fact No. 1, Vol. I, R. 19)

4. The court erred in finding that specifiers using the trade symbols K-4, K-5, K-11 and K-12 alone were not seeking lighting panels made and sold by plaintiff and that purchasers who ordered plaintiff's lighting panels with these trade symbols alone but received Carolite panels were not deceived. (Finding of Fact No. 12, Vol. I, R. 19-20)

5. The court erred in concluding that plaintiff does not have the exclusive right to use the trade symbols K-4, K-5, K-11 and K-12 on plastic lighting panels. (Conclusion of Law No. 2, Vol. I, R. 21)

6. The court erred in concluding that plaintiff does not have any common trademark rights in the trade symbols K-4, K-5, K-11 and K-12. Conclusion of Law No. 3, Vol. I, R.21)

7. The court erred in concluding that Sunbeam is not guilty of unfair competition by substituting, without authorization, lighting panels manufactured by others than plaintiff when the specification or purchase order designates the lighting panels to be supplied with the trade symbols K-4, K-5, K-11 or K-12 alone. Conclusion of Law No. 5, Vol. I, R. 21)

ARGUMENT

In summary, argument for plaintiff-appellant involves two primary issues. First, plaintiff asserts that the trade symbols K-4, K-5, K-11 and K-12 are recognized in the trade as identifying lighting panels manufactured and sold only by K-S-H Plastics, Inc. These symbols identify origin of the product and the fact that they also incidentally designate particular patterns embossed on plaintiff's lighting panels does not render the symbols unprotectable. Sunbeam entirely failed to show that these trade symbols were generic designations for a lighting panel pattern configuration.

Second, since the symbols K-4, K-5, K-11 and K-12, standing alone, are a designation of plaintiff's product, a specification prepared by a lighting engineer using one of such symbols is a demand for plaintiff's product only. When a merchant who receives a request for one manufacturer's product, substitutes without approval or authorization of the customer an indistinguishable product of another, he is palming off. The law of unfair competition proscribing palming off is of virtually antediluvian origin. And Sunbeam has admitted that it substitutes without approval when it receives specifications identifying the panels with the symbols K-4, K-5, K-11 or K-12 alone.

A. The Trade Symbols K-4, K-5, K-11 and K-12 Are Valid Common Law Trademarks

The primary question on this appeal involves the significance of the trade symbols K-4, K-5, K-11 and K-12*

*At the trial plaintiff offered proof that the United States Patent Office recognized K-11 and K-12 as registrable trademarks when it passed them for publication, but the court excluded this proof presumably on the ground that the application in the U.S. Patent Office were filed after the subject lawsuits. (R. 120-122)

used by plaintiff. The lower court erred in failing to find that these symbols functioned so as to identify plaintiff's products. This error emanated from the court's misunderstanding as to the nature and function of trademarks. The court viewed the question as whether plaintiff was entitled to "appropriate" a part of the alphabet. (R. 770, 772) Indicative of the court's failure to appreciate that a symbol which identifies a product made by a particular manufacturer is a trademark, regardless of Federal registration, and is entitled to protection, is shown by the statement of the court:

"I could hold that the K number alone is not a trademark, but there is a *secondary meaning* of the K number alone, and by substituting the C number for a K number, there has been unfair competition. I may not go so far as to hold that the K number is a trademark." (Emphasis added) (R. 659)

Thereafter, the court stated with respect to secondary meaning:

"Well, I don't think there is any question that the defendants, *both Sunbeam and Carolite recognize that K, K-4, K-5, K-11 stood for or represented one of the plaintiff's panels*. I don't think there is any question about that. They understood it.

"But the problem in my mind is whether or not you can get such a right by usage." (Emphasis added) (R. 773-74)

It is plaintiff's position that Sunbeam and Carolite, as well as other members of the lighting industry, recognize that K-4, K-5, K-11 and K-12 identify plaintiff's products, and that *symbols which serve such function through usage are protectible trademarks*. The court failed to apply the proper law to the facts which clearly showed that plaintiff's symbols were trademarks.

Plaintiff would ordinarily not feel compelled to cite authority for the proposition that a trademark is created by usage. However, since the trial court raised the question, we submit that this issue was settled in the *Trademark Cases*, 100 U.E. 82, 94 (1879) where the court noted that the exclusive right to use a symbol is founded upon *use* of the symbol and not merely adoption.

In the present case, plaintiff has established long continuous and exclusive use of the symbols K-4, K-5, K-11 and K-12. Defendants have neither denied nor controverted the wide-spread usage, but have contended that these symbols are used in the trade only to designate pattern configuration. It is therefore important to show, first, that the case law recognizes that a symbol may serve a dual function, and second, that the evidence establishes that K-4, K-5, K-11 and K-12 indicate source and incidentally pattern.

1. The Law Recognizes That Trademarks May Also Serve To Indicate Grade, Quality Or Pattern In Addition To Indicating Source Or Origin

In *Tillman & Bendell v. California Packing Corp.*, 63 F.2d 498 (9th Cir. 1933) decided by this Court, the plaintiff sold four different brands of coffee and designated its most superior brand with the term "Del Monte." One of the defenses relied upon by the defendant was that plaintiff's use of this term was in a grade mark sense and consequently could not be protected as a trademark. The Court reviewed considerable conflicting testimony with respect to the manner in which the term was used in the trade and stated at page 504:

"Despite the various discrepancies in the testimony and the variances in the exhibits, we are of the opinion that the course of dealing of the appellant

during the past four decades indicates that the 'function' of the name 'Del Monte' was, particularly, at least, to designate the 'origin' or 'ownership'. That the name also fulfilled the office of a grade designation did not, as we shall presently see, militate against its trade-mark use."

The Court then discussed the earlier cases of *Menendez v. Holt*, 128 U.S. 514 (1888) and *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U.S. 537, 11 S.Ct. 396 (1891). In each of these cases the issue of whether a particular symbol was a grade mark or a trademark was raised. The Supreme Court reviewed the evidence and in the *Menendez* case found that the term indicated both origin and quality and concluded that the term was to be protected as a trademark. In the *Lawrence* case, the court concluded to the contrary, based upon substantial evidence that the term had been used as a grade designation by numerous manufacturers other than the plaintiff and in some instances competitors had used the term *prior* to plaintiff. These Supreme Court cases illustrate that the status of a symbol, grade mark or trademark, depends upon the facts of the particular case. Thus, in this Court's holding in the *Tillman & Bendell* case, the Court was undoubtedly correct in stating that the mere fact that a symbol indicated grade or quality *in addition to indicating origin* did not foreclose a holding that the symbol was a protectible trademark.

In *Apple Growers Association v. Pelletti Fruit Co.*, 153 F.Supp. 948 (N.D.Cal. 1957), the *Tillman & Bendell* case was relied upon to reject a contention that a symbol could not be protected as a trademark if it also indicated grade. The Court stated at page 950:

"This argument also is without foundation for it is clear that a trademark may include a designation of grade or quality without losing its character as a trademark."

In the recent case of *Kiekhäfer Corp. v. Willys-Overland Motors*, 236 F.2d 423 (C.C.P.A. 1956), the court suggested that the determinative facts on the status of a particular symbol are the intent and manner in which the symbol has been used by the person claiming ownership and the manner in which customers and prospective customers used the symbol.

2. Plaintiff Intended To Use And Has Used K-4, K-5, K-11 And K-12 To Indicate Origin Of Its Lighting Panels

The intent of plaintiff to use K-4, K-5, K-11 and K-12 as trademarks was unequivocally set forth by the president and vice-president of K-S-H Plasties Inc. (R. 12, 42 and 288) The manner in which these symbols have been used by plaintiff, since the first symbol was adopted in 1958, also corroborates the testimony of plaintiff's officers with respect to plaintiff's intent to use these symbols to indicate origin. Trademark emphasis is particularly evident in the advertising material, literature and catalogs distributed by plaintiff since 1962. (Plf. Exs. 4, 8 and 22) It was at this time, according to the testimony of plaintiff's vice-president, that plaintiff directed its advertising and promotion toward the lighting engineers and architects who performed the actual selection of the lighting panels to be purchased. (R. 92)

Prior to 1962 when plaintiff began its heavy advertising, lighting panels were only generally described by the specifiers and the selection of the manufacturer of the panel was left to the lighting fixture manufacturers which favored their own panels. When the fixture manufacturer did buy from panel manufacturers they obviously knew where the order was sent and therefore plaintiff's earlier trade literature distributed to fixture

manufacturers appeared to use the symbols particularly to designate a lighting panel pattern configuration. However, to reach the business at its actual source, *i.e.* the persons who specified lighting panels but who were generally unfamiliar with panel manufacturers, post-1962 advertising shows primary use of the symbols K-4, K-5, K-11 and K-12 to indicate origin and only incidentally to identify a pattern. (Plf. Exs. 4 and 8 through 23)

3. The Trade Has Used K-4, K-5, K-11 and K-12 To Identify Lighting Panels Manufactured Only By Plaintiff

With respect to the manner in which the trade symbols K-4, K-5, K-11 and K-12 are used in the trade, there was, as may be expected, conflicting testimony introduced by the parties. It is submitted, however, that the evidence entirely and completely fails to support a finding that these symbols were used solely to indicate pattern by persons in the trade. Indeed, the evidence preponderates in favor of a finding that the symbols K-4, K-5, K-11 and K-12 were used by persons in the lighting industry primarily in a trademark sense, *i.e.* to indicate origin. Plaintiff's symbols are used and are familiar to three distribution levels in the industry: (1) lighting panel manufacturers, (2) lighting fixture manufacturers, and (3) specifiers.

Aside from the above-mentioned testimony of plaintiff's officers only two other persons employed by lighting panel manufacturers testified with respect to the function of plaintiff's symbols. The unequivocal testimony of the Sales Vice-president of plaintiff's largest lighting panel competitor, Sheffield Plastics, Inc., was that K-4, K-5, K-11 and K-12 mean a lens manufactured only by K-S-H Plastics, Inc. (R. 234) This knowledgeable member of

the lighting industry also was aware that each of the various symbols additionally designated a particular lighting panel pattern configuration. (R. 235)

The Sales Manager of Carolite Inc., Wendell Vaughn, also testified that as an employee of a lighting panel manufacturer he was familiar with K-4, K-5, K-11 and K-12. The witness stated that when discussing lighting panels, with prospective purchasers, seeing these terms would bring K-S-H to mind. (R. 759) Of lighting panel manufacturer employees and officers, only Carolite's president, Larry A. Wellen, testified that K-4, K-5, K-11 and K-12 meant pattern configuration only.

Representatives from numerous lighting fixture manufacturers testified as to the function of K-4, K-5, K-11 and K-12. Lighting fixture manufacturers are familiar with lighting panel manufacturers' trademarks since they receive specifications, prepare bids based thereon, and order the panels to be supplied with their fixtures. Mr. Harold Glass, the Executive Vice-President of Lighting Products Inc., stated that these terms definitely mean a particular lighting panel manufactured *only* by K-S-H Plastics, Inc. (Plf. Ex. 106, Glass Depn., pp. 7 and 13-14) Another vice-president of the same company also testified that K-4, K-5, K-11 and K-12 indicate lighting panels made and sold by plaintiff. (Plf. Ex. 107, Church Depn., pp. 6-7 and 50). Lighting Products, Inc. is a midwest concern doing a nationwide business selling lighting fixtures and panels almost exclusively in response to specifications. (Plf. Ex. 106, Glass Depn. p. 12)

Mr. Charles Perry, manager for the Day-Brite Lighting Company in Sunnyvale, California, one of the largest lighting fixture manufacturers in the United States, also testified as to the function of K-4, K-5, K-11 and K-12.

He stated that these trade symbols indicate a lens made *only* by K-S-H and that a particular term also identifies the pattern embossed on the lens. (R. 529)

Representatives of one of the other largest fixture manufacturers, Sunbeam Lighting Co., Inc., the defendant herein, also testified. Prior to commencement of the suit against Sunbeam, plaintiff took the deposition of a number of Sunbeam's officers and employees in the *Carolite* case. Since Sunbeam was not involved in any dispute with plaintiff at that time, the statements of these witnesses with respect to K-4, K-5, K-11 and K-12 were unbiased and forthright. At the trial of the consolidated cases the witnesses recanted their prior testimony, but the obvious self-interest motive in changing their testimony prompted the trial court to comment unfavorably upon their trial statements. (R. 747) As noted above, the lower court stated that there was not "any question" that Sunbeam and Carolite recognized that K-4, K-5, K-11 and K-12 "stood for" one of plaintiff's panels. (R. 773-74)

Mr. Ed Lathram of Sunbeam testified at his deposition that the trade symbols K-4, K-5, K-11 and K-12 mean that K-S-H manufactures the lighting panel. (R. 678) Mr. Lathram's responsibility at Sunbeam is the supervision of the preparation of quotations and bids submitted by Sunbeam in response to specifications; he has been long familiar with lighting panels, panel manufacturers, and the trademarks used by panel manufacturers. (R. 631)

The president of Sunbeam, Herbert L. Krieger, testified at his deposition that when he saw or heard the terms K-4, K-5, K-11 and K-12 he would associate them with K-S-H and would know they identify a K-S-H product. (R. 703, 705) The assistant sales manager for Sunbeam

also stated during his deposition that the symbols K-4, K-5, K-11 and K-12 indicate K-S-H. (R. 711) He was certain of this association because of his long experience in the industry and familiarity with these terms. (R. 712) Similarly, the Purchasing Agent for Sunbeam, William Harden, testified that he was familiar with plaintiff, and its product identification symbols having supervised the purchasing by Sunbeam for fourteen years. (R. 736-37) This witness stated that the terms K-4, K-5, K-11 and K-12 would mean K-S-H. (R. 741-42)

The Sunbeam witnesses' testimony indicates clearly that the trade symbols K-4, K-5, K-11 and K-12 were used and known in the industry to identify lighting panels manufactured and sold *only* by plaintiff. This usage is consistent with that of other large nation-wide fixture manufacturers, such as Day-Brite Lighting Products, Inc.

It is almost incredulous that after the series of consistent patent admissions by Sunbeam officers and employees before trial, Sunbeam had the temerity to subsequently deny that plaintiff's trade symbols identified *only* K-S-H lighting panels. The lower court recognized that K-4, K-5, K-11 and K-12 indicated single origin (R. 773-74) and indeed in the face of this overwhelming evidence it could not do otherwise.

To overcome the effect of this testimony, a number of representatives from local fixture manufacturers testified that the terms K-4, K-5, K-11 and K-12 identified only a panel pattern configuration. Specifically, employees and officers testified from Haluk Lighting Company, Wellmade Metal Products Company, Globe Illumination Company, Nu-Lite Fluorescent Manufacturing Company and Acme Lighting and Manufacturing Company. In considering

the testimony of representatives of these companies, small weight can be accorded thereto since each of the companies were supplying Carolite lighting panels in response to orders and specifications using K-4, K-5, K-11 and K-12. (R. 959, 991 and 1022).

If these witnesses had testified that they knew the terms K-4, K-5, K-11 and K-12 to be a designation of plaintiff's panels, they would have admitted in open court that they were palming off Carolite panels on their unsuspecting customers. This was precisely the basis upon which plaintiff was suing Sunbeam as the witnesses were well aware. Thus, these witnesses had a clear self-interest in aiding defendants in establishing that plaintiff's terms were only pattern designations. Their biased testimony that the terms K-4, K-5, K-11 and K-12 do not identify K-S-H panels was of little value in determining the industry recognition for plaintiff's terms. When weighed against the testimony of the representatives from other fixture manufacturers, the evidence shows that fixture manufacturers generally recognize the terms K-4, K-5, K-11 and K-12 as identifying the panels made and sold by K-S-H.

Architects and lighting engineers are undoubtedly the most important group of persons in the lighting industry with respect to the recognition of the terms K-4, K-5, K-11 and K-12. These are the customers who actually specify what product they desire and how they identify such products to obtain what they want is obviously significant. They prepare the specifications from which the fixture manufacturers prepare their bids and which serve as an "order" for the product they desire. Familiarity with the words, terms and symbols used by product manufacturers to identify their products is of utmost importance to the specifiers.

Of course as in any class of customers, there are specifiers who abdicate their responsibilities to the building owners by relying upon fixture manufacturers to choose the best lighting panel to be supplied with the fixture. Their lack of concern for detail, unfortunately, results not only in a disservice to their client but also in testimony which is unrepresentative of their profession.

In the present case, four lighting engineers testified at the trial. In addition, a lighting engineer employed as a general manager of an electrical contractor, Robert E. Kohnen, was deposed by plaintiff in connection with an unapproved substitution by Sunbeam for K-4 lighting panels. This witness stated that K-4 indicates a "KSH acrylic lens" to him. (Plf. Ex. 116, Kohnen Depn., p. 9)

Of the four trial witnesses, Mr. J. S. Hamel testified on behalf of plaintiff. Mr. Hamel has over thirty years of electrical and lighting consulting experience throughout the country. His firm planned and designed the lighting installations for the New York World's Fair in 1964-65. (R. 501) For over ten years he has been the consulting engineer for Walt Disney Productions and performed all of the consulting work for Disneyland, the planned Disneyland in Florida and the Mineral King resort area. (R. 501) In the Los Angeles area his firm has performed the electrical and lighting engineering consulting work on the Los Angeles International Airport, Chavez Ravine Ball Park, numerous buildings at the University of California and the University of Southern California and over eighty schools and industrial installations. (R. 501-02) Mr. Hamel has done design consulting work for various electrical equipment manufacturers, including design of lighting panels and fixtures. (R. 503) His firm has specified K-S-H lighting panels and has approved K-S-H panels on submittals. (R. 503)

This distinguished witness testified that he was familiar with K-S-H and had always known that the trade symbols K-4, K-5, K-11 and K-12 identified products made *only* by K-S-H. (R. 504)

Mr. Fred Cooper, also an electrical and lighting consulting engineer, stated that he was familiar with plaintiff's products and plaintiff's trade symbols. (R. 547) The witness testified that he associated the symbols K-4, K-5, K-11 and K-12 only with products manufactured by K-S-H. (R. 549) On cross-examination, he re-affirmed that these terms identified a particular manufacturer and added that he also knew that the terms designated a panel pattern configuration. (R. 550) Despite insistent questioning, Mr. Cooper stated that he did not use the terms K-4, K-5, K-11 and K-12 to designate pattern only even at the preliminary design stage, since in his experience "the manufacturer of a lens is of considerable importance . . . and hence we do not very lightly make a reference to a lens numbers or a designation, stopping only with the general pattern." (R. 552)

Mr. Henry Simmons, an independent lighting engineer, testified on behalf of Sunbeam. This witness stated that he used "K-numbers" to designate panel pattern configurations when the fee he receives justifies drawing up only a "brief set of specifications." (R. 811-12) According to this witness, he uses a "K-number" to identify the pattern and is not concerned with the panel manufacturer since he relies on reputable fixture manufacturers to choose the panel source. (R. 818, 822-23) Where he has no prior experience with the fixture manufacturer he would require a submittal of the panel performance characteristics. (R. 823) And where he was dubious of the fixture manufacturer, he would require a submittal as to panel source,

or he would explicitly name K-S-H as the source to “protect the owner.” (R. 818, 840) Mr. Simmons was only familiar with three plastic panel manufacturers—K-S-H, Carolite and Sheffield—and admitted he was not “familiar with other or many manufacturers.” (R. 834, 838)

The reason Mr. Simmons had the opinion that K-4, K-5 K-11 and K-12 identified only pattern was, he stated, “because I have used it, seen it used so many times.” (R. 828) He was not aware of *any* other lighting panel manufacturer that used these terms (R. 825), and he was aware that K-S-H had “originated” these terms. (R. 812)

The purport of this witness’ testimony is that while he knew that K-S-H is the *only* manufacturer using the terms K-4, K-5, K-11 and K-12, he had seen and used the terms so much that he did not associate them with plaintiff. He was not familiar with panel makers other than plaintiff and defendant and only cursorily with Sheffield which explains why he relied upon the fixture manufacturers. He knew that when he specified a panel as say, K-5, he received a satisfactory product from the fixture manufacturer, though he didn’t know the panel manufacturer. But probably the most enlightening part of Mr. Simmon’s testimony is that he used a personal system of fixture manufacturer evaluation so as to relieve himself from investigation of lighting panel manufacturers. Thus his opinion as to the function of the trade symbols K-4, K-5, K-11 and K-12 is hardly indicative of the practice of other lighting engineers. In fact, Mr. Simon’s specifying practices were directly contrary to those of Mr. Cooper whose thoroughness led him to familiarity with lighting panel manufacturers and recognition of their identifying terms since the manufacturer of the panel is of “considerable importance.”

Unlike Mr. Simmons, the other lighting engineer testifying in defendants' behalf, Mr. Root, was familiar with trade journals and plaintiff's catalog and had seen many of plaintiff's advertisements. (R. 865-66) Although he was aware that K-S-H *only* among panel manufacturers used the symbols K-4, K-5, K-11 and K-12 to identify its panels (R. 883), it was his opinion that such symbols designate pattern only. (R. 863) The witness stated that he identified the term P-4 with Rohm & Haas lighting panels (R. 885), and that he knew Carolite used the term C-4. (R. 894) He also associated the term "Pattern 70" with glass lighting panels of a particular pattern made by Corning. (R. 887)

In response to questioning by the Court, Mr. Root stated that if he wanted a panel made by Carolite he would not call for a Carolite K-4, but rather a Carolite C-4 (R. 864). If the witness was of the opinion that the symbol K-4 designated only pattern, the question arises why he would not name the manufacturer—Carolite—and then use that term which he recognizes as the pattern designation—K-4. The only rational basis for using C-4 for one manufacturer's panel and K-4 for another manufacturer's panel is that *the symbol K-4 is associated with and serves to distinguish K-S-H panels*. At once, Mr. Root states that K-4 means only pattern but when he desires that pattern from Carolite he identifies it by another symbol. However doggedly the witness persisted in the opinion that K-4 means only pattern, his conduct belies his words.

With respect to K-5, K-11 and K-12, the witness had *no* experience in using these symbols (R. 884) and would only "*assume*" that these terms indicated pattern. (R. 888) Of course, such testimony is entitled to no weight since the witness has no personal knowledge.

In substance, Mr. Root's testimony was conflicting in effect and demonstrably lacking in familiarity with the function served by plaintiff's symbols K-4, K-5, K-11 and K-12. His statements that these symbols designated only pattern were based upon slight familiarity with the one symbol, K-4, considerable supposition and unwarranted assumption. The manner in which he would use K-4, only with the name K-S-H, evidences that his concept of "pattern" means the pattern of a *particular* and *single* manufacturer. Of course, this is tantamount to a trademark, the function of which is to identify the product of a particular manufacturer.

On balance, the expert testimony weighs heavily in plaintiff's favor. Plaintiff proved that it adopted and began to use the symbols K-4, K-5, K-11 and K-12 with the intent that such symbols identify panels made by plaintiff and only incidentally to designate a pattern. It has been the exclusive lighting panel manufacturer to use such symbols as every witness readily agreed. Most of the trade witnesses recognized that the symbols identified a single source of lighting panels, namely, K-S-H Plastics, Inc.

4. Defendants Had The Burden Of Proof Of Showing That The Symbols K-4, K-5, K-11 And K-12 Are Generic Terms In The Industry For Designating Pattern Configuration And Failed To Meet Their Burden Of Proof

The common law has evolved a distinction between two types of trademarks: technical and non-technical. Technical trademarks are letters, words, symbols or terms that are arbitrary, distinctive and fanciful and therefore upon adoption and continuous use the exclusive right to use is immediately acquired. Non-technical trademarks, such as descriptive terms, geographic terms, or surnames are

protected only if they have acquired secondary meaning through substantially exclusive and continuous use for a period of time whereby they indicate a particular source of goods. 3 Callman, *Unfair Competition and Trade-Marks*, Sec. 66.1 (2d ed. 1950).

It is well established that once it is shown that a non-technical trademark has acquired secondary meaning, the scope of protection accorded to it is identical to that of a technical trademark. *Eastern Columbia, Inc. v. Waldman*, 30 Cal. 2d 268, 181 P.2d 865 (1947); *North American Air. Sys. v. North American Aviation*, 231 F.2d 205 (9th Cir. 1955).

It is therefore apparent that the distinction between technical and non-technical trademarks is significant only with respect to the establishment of ownership of the trade symbol, *i.e.*, the exclusive right to use. The party asserting exclusive right to use of a trade symbol must adduce that proof which evidences secondary meaning in order to establish its ownership of a non-technical trademark. On the other hand, title to a technical trademark is proved by simply showing prior adoption of the trade symbol and continuous use thereafter.

Since the present case with respect to the charge of trademark infringement of the symbols K-4, K-5, K-11 and K-12 involves common law trademarks or unfair competition, the law of California applies. *Kemart Corporation v. Printing Arts Research Lab., Inc.*, 269 F.2d 375, 389-90 (9th Cir. 1959).

In cases applying California law the above distinction between the plaintiff's burden of proof, as dependent upon whether the mark asserted is technical or non-technical, is recognized. If the trademark is inherently arbitrary and distinctive, proof of prior adoption and continuous

use of the mark will establish plaintiff's exclusive right to use. Cal. Bus. & Prof. Code, Section 14270; *Eastern-Columbia, Inc. v. Waldman*, 30 Cal. 2d 268, 181 P.2d 865 (1947); *Stork Restaurant, Inc. v. Sahati*, 166 F.2d 348 (9th Cir. 1948). However, if the mark is descriptive or geographic, plaintiff must prove that the mark has acquired a secondary meaning so as to have become distinctive and indicative of a single source of the goods to which it is applied. *Colvig v. KSFO*, 224 Cal. App. 2d 357, 36 Cal.Reptr. 701 (1964); *West v. Lind*, 186 Cal. App. 2d 563, 9 Cal.Reptr. 288 (1960); *Academy of Motion Picture Arts & Sciences v. Benson*, 15 Cal. 2d 685, 104 P.2d 685 (1940); *North American Air. Sys. v. North American Aviation*, 231 F.2d 205 (9th Cir. 1955).

It is plaintiff's position in the present case that the trade symbols K-4, K-5, K-11 and K-12 were arbitrary and distinctive upon their adoption by plaintiff. The evidence clearly shows that, prior to plaintiff's adoption of these terms, the terms were not used by *any* lighting panel manufacturer, lighting fixture manufacturer or other persons or firms in the lighting industry. Indeed, there was no evidence to show that even the numeral portions of these symbols had been used by other lighting panel manufacturers prior to their adoption by plaintiff with the sole exception of the numeral 4 used by another manufacturer at an earlier date.

The decisional law illustrates that a trademark comprising letters or numerals, unless such letters are an abbreviation of the name of the product, are not descriptive and may be arbitrary and distinctive. In *Amoskeag Mfg. Co. v. Trainer*, 101 U.S. 51 (1879) at page 79, it is stated:

"The letters [A.C.A.] themselves do not suggest anything, and require explanation before any meaning can be attached to them."

In 3 Callman, *Unfair Competition and Trade-Marks*, Sec. 73.2, at 1139 (2d ed. 1950) it is stated:

“ . . . it is evident, on analysis, the numerals or letters can actually describe nothing and have no patent connection with the article or its characteristics.”

The test for determining whether a particular trade symbol is descriptive was well stated in *Bliss-Craft of Hollywood v. United Plastics Co.*, 294 F.2d 694 (9th Cir. 1961). This Court stated, at page 700, that the proper test was whether the trade symbol would “convey to a person who had never seen the [product], and who did not know what it was, any idea of its character” or would be “an appropriate term to be used by a person desiring to describe it.” As originally adopted by plaintiff, the symbols K-4, K-5, K-11 and K-12 were entirely arbitrary in identifying a manufacturer and a pattern designation. To a person who had never seen a lighting panel bearing one of these symbols, the symbols would not give any idea of the character of the pattern embossed on the panel nor would such symbol be descriptive of the geometric configuration of the pattern.

If plaintiff's subsidiary use of these symbols was to designate a particular pattern configuration these symbols would only convey to a person familiar with *plaintiff's* product that a particular pattern was embossed thereon. K-4, K-5, K-11 and K-12 did not identify a pattern at the time they were adopted by plaintiff and in fact were entirely meaningless. It will therefore be seen that these symbols, as they were initially used by plaintiff, were *technical* trade marks and were entitled to protection. It was not incumbent upon plaintiff to prove that these arbitrary, non-descriptive, non-geographic and distinctive trade symbols had acquired secondary meaning since the symbols had no primary meaning.

Defendants therefore undertook the burden of showing that K-4, K-5, K-11 and K-12 had been adopted by the entire industry as a pattern designations, *i.e.*, generic symbols, and that it became imperative to use such symbols to conduct their business. The irrefutable evidence, however, establishes that none of the manufacturers which make panels having the same pattern configuration as plaintiff (even Carolite used a colorable imitation) have felt obliged to designate their panels with the symbols used by plaintiff. On the contrary, *every single witness* stated that plaintiff was the exclusive panel manufacturer using K-4, K-5, K-11 and K-12. Defendants only succeeded in showing that several local fixture manufacturers closely related to defendants used these symbols generically and that two Los Angeles lighting engineers do not personally assess the quality of panels and thus depend on the fixture manufacturer. Such evidence falls far short of meeting the burden of proof that the symbols K-4, K-5, K-11 and K-12 are *only* generic pattern designations.

Material to the issue of whether these symbols were pattern designations which other panel manufacturers were *compelled* to use in order to communicate with purchasers, is the testimony and evidence with respect to Sheffield Plastics, Inc. As noted above, the Sales Vice-President of this competitor of plaintiff testified that K-4, K-5, K-11 and K-12 mean a lens manufactured *only* by plaintiff. (R. 235) A Sheffield trade catalog and a box of sample lens with different patterns were introduced in evidence. (Plf. Exs. 40 and 41) Two of the panels made and sold by Sheffield have a pattern configuration identical to that on plaintiff's K-4 and K-5 panels. However, these panels are identified by Sheffield with the symbols SL-56 and SL-87, respectively. (R. 244; Plf. Exs. 40 and 41) Thus, contrary to defendants' protestations, plaintiff's largest lighting panel competitor, Sheffield Plastics, Inc.,

has *not* found it necessary to use plaintiff's terms to designate the pattern configuration.

In fact, of the numerous lighting panel manufacturers which make and sell panels having a pattern configuration identical to that embossed on plaintiff's K-4, K-5, K-11 and K-12 panels, *none* of such manufacturers use the symbols K-4, K-5, K-11 or K-12. (Plf. Ex. 190) Furthermore, only one of these manufacturers, aside from Carolite, use the same numeral in connection with the same panel pattern configuration as the numeral used by plaintiff. (Plf. Ex. 190)

It is apparent from the above discussion that defendants have entirely failed to meet their burden of proving that the symbols K-4, K-5, K-11 and K-12 are generic pattern designations. Since these symbols were not previously used, in any manner, prior to plaintiff's adoption and first use thereof, they were trademarks, and their source identifying function has not been subsequently impaired. The symbols have not been used in the trade as a generic pattern designation by lighting panel manufacturers or a preponderance of lighting fixture manufacturers or specifiers, and in fact, the evidence demonstrated the source identifying function of the symbols.

B. Sunbeam Has Palmed Off Lighting Panels On Customers By Supplying Carolite Lighting Panels, Without Approval, When Plaintiff's Panels Were Specified

The law of unfair competition has long extended protection to the public against palming off. This was most recently reiterated in *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 74 S.Ct. 779 (1964) where it was stated at 376 U.S. 238:

"A State of course has power to impose liability upon those who, knowing that the public is relying

upon an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original."

Palming off occurs when a customer requests goods made by a particular manufacturer, usually by use of the manufacturer's trade symbol, and is supplied with other goods without his knowledge or approval. To effect the unauthorized substitution, the dealer must be provided with goods identical to those that the customer requests and the dealer is oftentimes encouraged by the substitute manufacturer. In this light, the conduct of Sunbeam and Carolite, though part of a single scheme, will be discussed separately, in the respective briefs.

The tort of palming off by a third party or dealer is defined as the unauthorized substitution of the goods of one manufacturer when the goods of another are requested by the customer. As stated in *N. K. Fairbanks v. Dunn*, 126 Fed. 227, 228 (C.C.N.D. N.Y. 1903):

"The merchant, by assuming to fill the order, represents that the goods put up and delivered are those ordered. The law is too well settled on this subject to require extended quotation. The manufacturer of an article placed upon the market for sale has the right to demand of the dealer who purports and advertises to sell it that he deliver his product when called for by the customer."

In *Penn Oil Co. v. Vacuum Oil Co.*, 48 F.2d 1008 (D.C. Cir. 1931), the Court stated at page 1010:

"The unauthorized and undisclosed substitution of one article of sale for another is familiar ground for injunction against the seller."

And in *Singer Mfg. Co. v. Cohen*, 171 F.2d 266, 268 (7th Cir. 1948), the Court stated:

“When one orders parts by name of manufacturer, number, and description, he has a right to have his order filled as given, and if substitutions are made in circumstances calculated to lead the purchaser to believe he is getting what he orders when he is not, it is not only fraud upon the purchaser but also upon the manufacturer of the goods ordered for which the substitution was made. This was palming off, thinly disguised.”

Accord: *Upjohn Co. v. Katz*, 116 U.S.P.Q. 578 (S.D. N.Y. 1958); *Vehicle Apron & Hood Co. v. American Tire & Rubber Co.*, 193 Fed. 372 (C.C.N.D. Ill. 1912); *Enoch Morgan's Sons Co. v. Wendover*, 43 Fed. 420 (C.C.D. N.J. 1890).

These cases disclose that to prove palming off it must be shown that: (1) goods manufactured by plaintiff were requested; (2) goods manufactured by another were substituted; and (3) the customer did not approve or authorize the substitution.

It is clearly established that it is not necessary to show that the plaintiff's goods were requested by use of a technical trademark. In the case of *Wililam R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 44 S.Ct. 615 (1924) involving a suit by one manufacturer against a second manufacturer for enabling retailers to palm off products having identical appearances, the Court stated at pages 531-32:

“The manufacturer or vendor is entitled to the reputation which his goods have acquired and the public to the means of distinguishing between them and other goods; and *protection is accorded against unfair dealing whether there be a technical trademark or not*. The wrong is in the sale of the goods of one manufacturer or vendor as those of another.” (Emphasis added)

While product appearance can no longer serve as the identifying symbol for one manufacturer's product, *Compco*

Corp. v. Day-Brite Lighting Inc., 376 U.S. 234, 84 S.Ct. 779 (1964), protection against palming off was explicitly preserved in the *Compco* case, at least when the product is ordered by means other than appearance.

The requisite showing is simply that the customers requested plaintiff's product, as evidenced by the use of some term or trade symbol which identifies plaintiff. Obviously, the term used by the customer may be a technical trademark or a non-technical trademark so long as the symbol functions to identify plaintiff as a source. *Ross-Whitney Corp. v. Smith, Kline & French Lab.*, 207 F.2d 190 (9th Cir. 1953).

In a number of cases, defendants have raised the defense that the term by which the goods are requested was generic and therefore did not refer to a particular manufacturer. But where the term was found to indicate a particular brand, courts have unhesitatingly enjoined the unfair competition. *Winthrop Chemical Co. v. Weinberg*, 60 F.2d 461 (3d Cir. 1932); *Barnes v. Pierce*, 164 Fed. 213 (C.C.S.D. N.Y. 1908). In *Coca Cola Co. v. Boas*, 27 F.2d 756 (D. Idaho 1928) the defendant argued that customers calling for Coke, rather than Coca-Cola, were not requesting plaintiff's product since this term was not a trade-mark (at that time). The Court rejected this defense observing that the term was a well-known nickname for plaintiff's beverage and stated at page 758:

“Under such circumstances the courts apply the established principle that, where the general public has given to one's product another name, such as “Coke”, or any other nickname, and by which it is known to the trade, and another, upon calls of customers for “Coke”, or such nickname, serves a product other than the former's, he is then passing off his product as that of another, and in doing so the public

is deceived as to the article purchased, and protection by injunction will be granted one whose rights are so infringed upon, as such conduct is regarded as competing unfairly.”

In the case of *Coca-Cola Co. v. Scrivner*, 117 U.S.P.Q. 394 (S.D. Cal. 1958), a factually analogous situation was presented involving the palming off of another beverage, identical in appearance to that made by plaintiff, as that of plaintiff, when customers requested plaintiff's product by the marks Coca-Cola or Coke. As in most cases of palming off, the product was not delivered to the customer in its original container and therefore the purchaser was unable to discern that it was a different product. See, *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 530, 44 S.Ct. 615, 617 (1924). Of course, the same situation prevails in the present case where the panels are supplied with the lighting fixture and not in the panel manufacturer's containers *and the substituted panels are not marked*. The court enjoined defendant from such substitution unless authorization was first obtained from the purchaser. Accord: *Coca-Cola Co. v. Bisignano*, 145 U.S.P.Q. 375 (S.D. Iowa 1965); *Coca-Cola Company v. Foods, Inc.*, 220 F.Supp. 101 (D.S.D. 1963); *Coca-Cola Co. v. Armbruster*, 136 U.S.P.Q. 263 (D. Kansas 1963); *Coca-Cola Co. v. Kendzie*, 133 U.S.P.Q. 93 (N.Y. Sup. Ct. 1962).

It is plaintiff's position that the present case is factually and legally analogous to the “pharmacist cases”, such as *Winthrop Chemical Co. v. Weinberg*, 60 F.2d 461 (3d Cir. 1932). These cases can be compared with the present case as follows: Doctors [lighting engineers] prescribed in writing [specified] in behalf of patients [building owners] a drug [lighting panel] made and sold by a particular manufacturer [plaintiff] and designated by a trade symbol K-4, K-5, K-11 or K-12. This demand was transmitted

to a pharmacist [Sunbeam] who supplies this commodity. But the pharmacist [Sunbeam] procures an almost indistinguishable drug [lighting panel] from another manufacturer and foists this upon the patient [building owner] and doctor [lighting engineer] without informing them [obtaining approval] of the substitution.

It will be noted that in the pharmacist cases, as here, the request is made in writing by an expert who is qualified to prescribe the product necessary for the consumer. And here, as in the pharmacist cases, the practice of substitution without approval should be enjoined where it is established that the goods requested are those manufactured by plaintiff and Sunbeam has admitted substituting without approval. (R. 660)

In the preceding section, it was shown that the trade recognizes the symbols K-4, K-5, K-11 and K-12 as identifying a lighting panel made by K-S-H Plastics, Inc. Architects and lighting engineers have therefore used these trade symbols alone in their specifications to order plaintiff's lighting panels. And Sunbeam's officers and employees have testified that it has substituted Carolite's indistinguishable lighting panels, without authorization, in response to such requests. (R. 605, 691-92) Moreover, Sunbeam counsel agreed to stipulate that Sunbeam indulged in such unapproved substitutions. (R. 658-60)

Thus, it is clear that Sunbeam has perpetrated fraud upon the specifiers by palming off a substitute product, without authorization, which is unfair competition. The lower court properly found palming off where the specification identified the panels with the term K-S-H. It should have held the same where the panels were identified only by K-4, K-5, K-11 or K-12. The court erred because it erroneously believed that plaintiff could have no exclusive right to trade symbols which comprise a letter-numeral combination.

We urge that this Court correct this error and thereby provide protection for specifiers upon whom Sunbeam has preyed.

CONCLUSION

The trade recognizes that the symbols K-4, K-5, K-11 and K-12 identify lighting panels manufactured only by plaintiff. Consequently, specifiers have used these trade symbols to demand plaintiff's products. Sunbeam, however, has substituted indistinguishable panels manufactured by other than plaintiff. It has not advised the customers of this substitution, nor has it sought approval or authorization for the change. This is palming off, clear and simple.

We respectfully urge that the judgment be reversed.

Respectfully submitted,

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Chicago, Illinois 60602

Attorneys for Appellant

C E R T I F I C A T E

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

APPENDIX



APPENDIX

| ent | Plaintiff's Exhibit No. | Marked for Ident., Record Page No. | Received in Evid., Record Page No. |
|---------------------------------------|-------------------------------|---|---|
| <u>Transcript</u> | | | |
| Trademark Reg. No. 639,495 | 1 | 13 | 14 |
| TE Trademark Reg. No. 687,973 | 2 | 14 | 14 |
| ulation of Facts; SH and Carolite | 3 | 67 | 85 |
| l, 3-ring catalog ue green) of KSH | 4 | 77 | 78 |
| grey catalog of KSH 61) (thick) | 5 | 77 | 79 |
| grey brochure of KSH 58) (thin) | 6 | 86 | 88 |
| green brochure of KSH | 7 | 89 | 89 |
| K-3 catalog page old/black) of KSH | 8 | 90 | 91 |
| atalog page (gold/black) of KSH | 9 | 90 | 91 |
| catalog page (gold/black) KSH | 10 | 90 | 91 |
| advertisement page (K-11) | 11 | 90 | 99 |
| advertisement page (K-12) | 12 | 99 | 99 |
| advertisement page (K-Pans) | 13 | 99 | 99 |
| advertisement page (Tedlar) | 14 | 99 | 99 |
| advertisement page (Tedlar) | 15 | 99 | 99 |
| advertisement page (K44) | 16 | 99 | 99 |
| advertisement page (K33) | 17 | 99 | 99 |
| advertisement page (Quality) | 18 | 99 | 99 |
| advertisement page pecification) | 19 | 99 | 99 |
| advertisement page pecification) | 20 | 99 | 99 |
| advertisement page (Quality) | 21 | 99 | 99 |

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| <u>Trial Transcript</u> | | | |
| KSH advertisement page (Quality) | 22 | 99 | |
| K-No. Lens Swatches on chain | 23 | 100 | |
| Specification Diagram | 24 | 117 | |
| Notice of Publication K-11 | 25 | 120 | |
| Notice of Publication K-12 | 26 | 120 | |
| Official Gazette TM p. 251 | 27 | 120 | |
| K-5 lens sample with K-Lite marking | 28 | 120 | |
| Notice of infringement ltr 4/21/65 | 29 | 120 | |
| Chart (West Coast) on sales | 30 | 130 | |
| Day Brite Buyer's Guide | 31 | 102 | |
| Columbia catalog (earlier than defendants) | 32 | 104 | |
| PALCO catalog | 33 | 104 | |
| Sunbeam Account Balance Sheet | 34 | 202 | |
| KSH Quotation dated 2/25/66 (9910) | 35 | 202 | |
| KSH Quotation dated 3/1/66 (9915) | 36 | 202 | |
| KSH Quotation dated 3/11/66 (9953) | 37 | 202 | |
| KSH Quotation dated 3/11/66 (1153) | 38 | 202 | |
| KSH Quotation dated 3/31/66 (10174) | 39 | 202 | |
| Sheffield Data File (blue) | 40 | 202 | |
| Sheffield Plastic Samples in box | 41 | 202 | |
| Globe letter 11/10/64 | 42 | 335 | |
| Globe order #7192 | 43 | 335 | |
| Globe order #7169 | 44 | 335 | |
| Globe order #7291 | 45 | 335 | |
| Invoice Nat'l Wholesale Elec. Co. G 11724 | 46 | 335 | |
| Invoice Action #1161 | 47 | 335 | |
| Freeman order No. 14615 | 48 | 335 | |
| ESI Fixture Survey 2727 (Charter Oaks) | 49 | 335 | |

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| <u>Transcript</u> | | | |
| Fixture Survey 2990 (at'l Gypsum) | 50 | 335 | 349 |
| Fixture Survey 2627 (onsen Hydraulic) | 51 | 335 | 349 |
| Fixture Survey 2696 (A. Trade Tech. College) | 52 | 335 | 349 |
| lite sample lens on key chain | 53 | 388 | |
| /27/62 Carroll to Roehlen | 54 | 390 | 391 |
| sample sent with 2/27/62 (hexagonal) | 55 | 390 | 391 |
| 0/3/62 Roehlen to Carroll | 56 | 390 | 394 |
| /3/63 Carroll to Roehlen | 57 | 390 | 397 |
| len invoice | 57 A | 390 | 397 |
| sample sent with 6/3/63 ltr (uver) | 58 | 390 | 397 |
| o 2/3/64 Carroll to Roehlen | 59 | 390 | 398 |
| sample sent with 2/3/64 memo (amond) | 60 | 390 | 400 |
| /27/64 Carroll to Roehlen | 61 | 390 | 401 |
| 0/9/64 Carroll to Roehlen | 62 | 390 | 403 |
| /28/63 ITL to Carroll | 63 | 406 | 408 |
| /6/63 Carroll to ITL | 64 | 406 | 411 |
| /10/63 ITL to Carroll | 65 | 406 | 413 |
| /17/63 Carroll to ITL | 66 | 406 | 414 |
| /31/63 Carroll to ITL | 67 | 406 | 415 |
| o 3/3/64 ITL to Carroll | 68 | 406 | 419 |
| ltr 3/5/64 Carroll to ITL | 69 | 406 | 421 |
| /24/64 Carroll to ITL | 70 | 406 | 422 |
| /27/64 Carroll to ITL | 71 | 406 | 423 |
| 1/10/64 Carroll to ITL | 72 | 406 | 424 |
| test reports | 72 A | 406 | 425 |
| lite Catalog (gold vinyl cover) | 73 | 406 | 427 |

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| <u>Trial Transcript</u> | | | |
| Wellmade Orders Nos. 6482, 5988, 6409 and Carolite invoices 0794 and 2061 | 74 | 417 | |
| Nulite Orders Nos. 1704, 9719, 9732, 1820, 1833 and 0348 | 75 | 417 | |
| Nulite Order 0183 and Carroll Inv. 0871 | 76 | 417 | |
| Nulite Order 4485 and Carroll Inv. 0678 | 77 | 417 | |
| Nulite Order 0362 and Carroll Inv. 00523 | 78 | 417 | |
| Nulite Order 4356 and Carroll Inv. 0477 | 79 | 417 | |
| Nulite Order 4376 and Carroll Inv. 0521 | 80 | 417 | |
| Ltr 6/25/65 Butler to Carolite | 81 | 417 | |
| Smoot Holman Order No. 91430 | 82 | 417 | |
| Sechrist Order 6/17/65 and Carolite Invoice 2344 | 83 | 417 | |
| Globe Order 5241 and Carolite Invoice 1442 | 84 | 417 | |
| Globe Order 5001 and Carolite Invoice 1201 | 85 | 417 | |
| Globe Order 5031 and Carolite Invoice 1182 | 86 | 417 | |
| Globe Order 4569 and Carolite Invoice 0717 | 87 | 417 | |
| Globe Order 4493 and Carolite Invoice 0629 | 88 | 417 | |
| Globe Order 4220 | 89 | 417 | |

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| <u>Transcript</u> | | | |
| Siegel Order (10 sheets) | 90 | 417 | 443 |
| ist Order 1/25/65 | 91 | 417 | 444 |
| 18/64 Carroll to mercial Reflector | 92 | 444 | 445 |
| ghouse correspondence (sheets) | 93 | 444 | 446 |
| ce Plastic correspondence (sheets) | 94 | 444 | 447 |
| ade correspondence (sheets) | 95 | 444 | 451 |
| 24/64 Carroll to Day Brite | 96 | 444 | 452 |
| ts; 1/7/64 ltr; 2nd page of r | 97 | 444 | 453 |
| 27/64 Carroll to du Pont | 98 | 444 | 458 |
| 19/65 Carroll to du Pont | 99 | 444 | 459 |
| te for C-12 Tedlar | 100 | 444 | 459 |
| from July LIGHTING ad (rolite) | 101 | 444 | 465 |
| ary 1965 LIGHTING ad (rolite) | 102 | 444 | 465 |
| ample Scissor Curve Sheet | 103 | 431 | 431 |
| etters; 9/25/63 Spensley Carolite | 104 | 444 | 468 |
| 3 ltr contract K-D and JWC | 105 | 444 | 469 |
| d A. Glass Deposition | 106 | 566 | 571 |
| I. Church Deposition | 107 | 567 | 571 |
| H. Evans Deposition | 116 | 573 | 573 |
| n Deposition | 117 | 573 | 573 |
| ng Fixture Specifications (sheets) | 118 | 577 | 577 |
| act Special Conditions stitution) (2 Sheets) | 119 | 577 | 577 |

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| <u>Trial Transcript</u> | | | |
| Sunbeam Drawing 24553D "QK4A" (9/10/63) | 120 | 577 | |
| Sunbeam Drawing 24313 "QK4S" (6/13/63) | 121 | 577 | |
| Sunbeam Catalog Pages (2 Sheets) | 122 | 577 | |
| GE Invoice 34177B dated 6/23/64 | 123 | 577 | |
| GE Invoice 41910B dated 10/26/64 | 124 | 577 | |
| GE Invoice 48707B dated 3/3/65 | 125 | 577 | |
| Sunbeam Memo 8/19/64 (3 Sheets) | 126 | 577 | |
| Hopper Truck Letter 8/10/64 | 127 | 577 | |
| Letter 11/5/64, Kohnen to GE | 128 | 577 | |
| Letter 1/26/65, Lathen to GE | 129 | 577 | |
| Letter 2/22/65, Kohnen to GE (2 Sheets) | 130 | 577 | |
| Letter 3/11/65, Kohnen to GE | 131 | 577 | |
| Unmarked carton for replace- ment panels | 132 | 577 | |
| Photos of carbon | 132 A | 577 | |
| Lens found in unmarked carton | 133 | 577 | |
| Howard PO 1046A (3 Sheets) | 134 | 577 | |
| GE Invoice 44411B dated 12/14/64 | 135 | 577 | |
| Carolite Invoice 0665 dated 11/23/64 | 136 | 577 | |
| Sunbeam PO 52869 dated 11/12/64 | 137 | 577 | |
| Letter, dated 8/18/65, Matloff to Plastics Specialties | 138 | 582 | |
| Letter, dated 9/10/65, Plastic Specialties to Matloff | 139 | 582 | |
| Letter, dated 9/14/65, Matloff to Plastic Specialties | 140 | 582 | |
| Letter 9/23/65, Stahlhut to Matloff | 141 | 582 | |

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| Manuscript | | | |
| Order 50593 (5/18/64) | | | |
| Carrollite "K4 Acrylic" | 142 | 585 | 585 |
| Invoice 14164 (5/18/64) | | | |
| Sunbeam "K-4" | 143 | 586 | 586 |
| Invoice 14305 (5/29/64) | | | |
| Sunbeam "K-4" | 144 | 586 | 586 |
| Order Drawing 24553E | | | |
| (5/63) "QK4A 3434-48RS" | 145 | 587 | 588 |
| Order dated 11/16/64 | | | |
| "4A3432" | 146 | 592 | 593 |
| Survey LM2-12862-C, Kaiser | | | |
| (Sheets) | 147 | 671 | 672 |
| 12/30/65, Lathram to | | | |
| Key, Sexton, and etc. | 148 | 688 | 688 |
| Order 2/7/64 (\$18.92) | | | |
| 49541 | 149 | 743 | 744 |
| Order 5/3/66 | 150 | 743 | 745 |
| Deposition | 151 | 760 | 760 |
| Loch Deposition | 152 | 760 | 760 |
| Ans Affidavit | 153 | 840 | |
| Order 7739-29901D | 154 | 881 | 881 |
| Swatch of | | | |
| Van-Haas P-4 | 155 | | 895 |
| Catalog | 156 | 911 | 912 |
| Pages from Sunbeam | | | |
| list with "Guarantee" | 157 | 1106 | 1107 |
| Carroll Deposition | 165 | 1132 | 1132 |
| Carroll Deposition | 166 | 1132 | 1133 |
| and Carroll Deposition | 167 | 1133 | 1135 |
| Wellen Deposition | | | |
| dated 11/29/65 | 168 | 1135 | 1136 |
| Wellen Deposition | | | |
| dated 1/25/65 | 169 | 1136 | 1136 |

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| <u>Trial Transcript</u> | | | |
| West Coast Lithograph Invoices dated 10/8/63 and 10/9/63 (C-55) | 170 | 1137 | |
| West Coast Lithograph Invoices 12/24/64 (C-12) | 171 | 1137 | |
| West Coast Lithograph Invoices dated 3/19/65 (C-12) | 172 | 1137 | |
| West Coast Lithograph Invoice dated 3/13/65 (C-12 Frameless) | 173 | 1137 | |
| West Coast Lithograph Invoices dated 3/23/65 (C-12) | 174 | 1138 | |
| West Coast Lithograph Invoices dated March 19, 1965 (C-11) | 175 | 1138 | |
| West Coast Lithograph Invoices dated 3/19/65 (C-11) | 176 | 1138 | |
| West Coast Lithograph Invoices dated 1/29/65 (C-4) | 177 | 1138 | |
| West Coast Lithograph Invoices dated 3/19/65 (C-4) | 178 | 1139 | |
| Wendell Vaughn Deposition | 179 | 1139 | |
| Herbert Krieger Deposition | 180 | 1141 | |
| Sol Matloff | 181 | 1144 | |
| KSH Box 1 x 4' Stamped with big K-12 | 182 | 1145 | |
| Xerox copy of LC catalog with "21-" designations | 183 | 1147 | |
| Hobnail sample | 184 | 1152 | |
| K-Lux brochure | 185 | 1153 | |
| Honeycomb sample | 186 | 1156 | |
| Stahlhut article in 11/64 issue of Light and Lighting | 187 | 1157 | |
| Frameless sample of Carolite | 188 | 1159 | |
| Frameless sample of KSH | 189 | 1159 | |

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| <u>Manuscript</u> | | | |
| Conf. pattern sheet | | | |
| Identification marks) | 190 | 1163 | 1164 |
| Brochure | 191 | 1167 | 1168 |
| Catalog | 192 | 1167 | 1168 |
| Catalog | 193 | 1170 | 1172 |
| Haas—Price List | | | |
| P-5, P-7 | A | 26 | 27 |
| of Corning 70 Glass | B | 28 | |
| Ex sample | C | 34 | 38 |
| Catalog Sheet | | | |
| Brochure) | D | 34 | 38 |
| Chain (only K-11 sample) | E | 36 | |
| Chain (only K-12 sample) | F | 39 | 39 |
| Piece of stamped Holsphane | G | 40 | |
| Back | H | 45 | 84 |
| Back front (glass) | I | | 46 |
| Over KSH catalog (current) | J | 49 | |
| Over KSH catalog (Blue Green) | K | 49 | |
| Early KSH Catalog | L | 49 | |
| on Carolite from PS | M | 144 | |
| on Carolite from PS | N | 144 | |
| on Carolite | O | 144 | |
| on Carolite | P | 144 | |
| on Carolite | Q | 144 | |
| ia Catalog | R | 148 | |
| ia Catalog Sheet | S 1 | 148 | |
| ce Catalog | S 2 | | |
| ia Catalog | R | | 161 |
| ia Catalog Sheet | S 1 | | 163 |
| ce Catalog | S 2 | | 163 |

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| K-Lite Ford Ad with "K-5 pattern", no date | V | 173 | |
| K-Lite Place Villa ad with "K-5 pattern", no date | W | | |
| K-Lite (Plas. Spec.) price list "Type K-2" (K-Lite pattern) | X | | |
| Sunbeam Purchase Order 6/4/65 (Sacramento) | Y | | |
| Luminous Ceiling brochure pages (Series B) | Z | 267 | |
| Luminous Ceiling brochure pages (Series V) | AA | 267 | |
| Luminous Ceiling brochure pages (Series R) | AB | 272 | |
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| Acme Ltg Catalog | AE | 276 | |
| Nat'l Order to Nulite (says only K-5, without "KSH") | AF | 374 | |
| Carolite Business Card | AG | 476 | |
| Carolite Envelopes | AH | 472 | |
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| KSH Price List with "F Nos." | AP | 722 | |
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| am Photometric Chart for JWCXA" | AR | 723 | 727 |
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| am Order dated 6/4/65 5265 | AT | 751 | |
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| Answers to Sunbeam's interrogs | BL | 1118 | 1126 |
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